FILE COPY

FILED
MAR 27 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 699

CAPITOL MEATS, INC., MARK SLOTKIN, also known as MORRIS SLOTKIN, LOUIS GERBER and MAX REINGOLD,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

IRVING J. ROTH,
60 East 42nd Street,
New York 17, N. Y.

Counsel for Petitioners.

INDEX

	PAGE
Jurisdiction	1
Opinion Below	2
Statement	2
Questions Presented	3
Statute Involved	4
Reasons for Granting the Writ	5
Argument	5
Conclusions	10

TABLE OF CASES CITED:

Christensen v. United States, 7 Cir., 90 F. 2d 152, 155	6
Corson v. United States, 9 Cir., 147 F. 2d 437	7
Fulbright v. United States, 8 Cir., 91 F. 2d 210, 211	6
Horsley v. United States, 5 Cir., 160 F. 2d 43, 46	6
Kreiner v. United States, 2 Cir., 11 F. 2d 722, 731, cert. denied 271 U. S. 688	6
Miller v. United States, 10 Cir., 120 F. 2d 968, 972, 973	7
Morris v. United States, 9 Cir., 156 F. 2d 525	7
People v. Wallens, 297 N. Y. 57, 62-63, 74 N. E. 2d 307	7
Sandroff v. United States, 6 Cir., 158 F. 2d 623, 630	6
Screws v. United States, 325 U. S. 91, 106-107	5, 6

PAGE

Spear v. United States, 8 Cir., 228 Fed. 485, 488 6
Spevak v. United States, 4 Cir., 158 F. 2d 594, 598, cert. denied 67 S. Ct. 771 6

United States v. Ausmeier, 2 Cir., 152 F. 2d 349, 356, 357 6
United States v. Levy, 3 Cir., 153 F. 2d 995, 998 6
United States v. Max, 3 Cir., 156 F. 2d 13 6
United States v. Noble, 3 Cir., 155 F. 2d 315 6
United States v. Pincourt, 3 Cir., 159 F. 2d 917 6

Williams v. United States, 79 U. S. App. D. C. 299, 131 F. 2d 21 7

Zimberg v. United States, 1 Cir., 142 F. 2d 132, 137-8, cert. denied 323 U. S. 712 6

OTHER AUTHORITIES CITED:

Section 240 (a) of Judicial Code, 28 U. S. C., Section 347(a) 1
Sections 687, 688, 18 U. S. C. 1
Rules of Criminal Procedure, Rule 37(b) 1, 2
Emergency Price Control Act of 1942, 50 U. S. C. A. Appendix Section 925(b) 2
2nd Revised Maximum Price Regulations 169 and 398 2
Section 4(a) of Emergency Price Control Act 3, 4, 5, 6
Section 205(b) of Emergency Price Control Act 3, 4, 5, 6, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No.

CAPITOL MEATS, INC., MARK SLOTKIN, also known as MORRIS SLOTKIN, LOUIS GERBER and MAX REINGOLD,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable FRED M. VINSON, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioners above named respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered March 1, 1948.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U. S. C., Section 347(a), and under Sections 687, 688, Title 18, U. S. C., and the Rules of Criminal Procedure adopted thereunder, particularly Rule 37(b).

The Circuit Court of Appeals for the Second Circuit affirmed the judgments of conviction on March 1, 1948. This petition is filed within thirty days from such date (Rule 37(b) of the Rules of Criminal Procedure).

Opinion Below

The opinion of the Circuit Court of Appeals (L. Hand, Swan and Frank, Circuit Judges) has not yet been officially reported. It is printed at pages 171 to 175 of the Record.

Statement

The judgment of the Circuit Court of Appeals sought to be reviewed affirmed the judgments of conviction and sentence of the petitioners rendered on May 29, 1946. The case was tried on May 9, 10 and 13, 1946, in the United States District Court for the Eastern District of New York before Honorable Clarence G. Galston, and a jury.

The information in the case at bar containing twenty-four counts charged the petitioners with violating the Emergency Price Control Act of 1942, 50 U. S. C. A. Appendix Section 925(b), by willfully and knowingly making sales of meats above the ceiling prices established by 2nd Revised Maximum Price Regulations 169 and 398.

The corporate petitioner, Capitol Meats, Inc., was a wholesale meat dealer and the individual petitioners, Slotkin, Gerber and Reingold, were its officers who made the alleged overceiling sales.

The testimony of the petitioners was that they had sold only at the maximum prices set forth in the invoices and the evidence showed that the sales were recorded upon the corporate books as so made. The purchasers to whom the sales were made testified that they had paid cash in addition to the ceiling prices shown on the invoices. The re-

ceipt of any additional sums over the ceiling prices was denied by the petitioners.

The corporate petitioner was found guilty on fifteen counts, each involving a distinct sale, and fined $1,000 on each count. Each of the individual petitioners was found guilty on counts involving sales made by him on behalf of the corporation, and each was sentenced to thirty days in jail on one of the counts, imposition of sentence on the others being suspended.

None of the petitioners has ever been convicted or charged with any other crime.

Questions Presented

1. Should the Supreme Court of the United States reverse the judgments of conviction in the case at bar for the reason that the Trial Judge in his charge to the jury had neglected to inform them either directly or by satisfactory explanation that a verdict of guilty could be supported only if in addition to finding that the defendants had violated Section 4(a) of the Emergency Price Control Act by making overceiling sales, they had also violated Section 205(b) of the Emergency Price Control Act?

2. Should the Supreme Court of the United States reverse the judgments of conviction in the case at bar for the reason that the Trial Judge had failed to charge the jury either directly or by satisfactory explanation that a conviction under Section 205(b) of the Emergency Price Control Act could rest only against a person who willfully violates any provision of Section 4 of the Act, and this although no exception to the failure to so charge was taken at the trial?

The Trial Court's charge to the jury is printed at pages 152 to 156 of the Record.

Statute Involved

Section 4(a) of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 28) 50 App. U. S. C. 904(a), provides:

> "It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202(b) or section 205(f), or to offer, solicit, attempt, or agree to do any of the foregoing."

Section 205(b) of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 33) 50 App. U. S. C. 925(b), provides:

> "Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4(c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment

under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought."

Reasons for Granting the Writ

This petition for a review on a writ of certiorari should be granted inasmuch as the opinion of the Circuit Court of Appeals for the Second Circuit rendered in the case at bar indicates that the questions hereinabove stated should be answered in the negative, whereas the decisions of the Circuit Courts of Appeals in all of the other Circuits indicate that the said questions should be answered in the affirmative. Furthermore, the Circuit Court of Appeals for the Second Circuit by its decision in the case at bar has decided a federal question in a way which conflicts with an applicable decision of this Court (*Screws* v. *United States,* 325 U. S. 91) and has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the Lower Court as to call for the exercise by this Court of its power of supervision.

ARGUMENT

The judgments of conviction in the case at bar rest wholly on the alleged violations by the petitioners of Sections 4(a) and 205(b) of the Emergency Price Control Act. These sections together define the crime charged, yet the Trial Court omitted to read them to the jury. The charge contains what purports to be an explanation of Section 4(a) of the Act but does not contain, either actually or purportedly, any reference to or explanation of Section 205(b) of the Act.

Section 4(a) makes overceiling sales unlawful but does not render them criminally punishable. Overceiling sales become criminal only when there is a willful violation of Section 4 of the Act, and the provision which creates the crime and renders the acts criminally punishable is contained wholly and solely in Section 205(b) of the Act.

To withhold from the jury all consideration of the subject matter contained in Section 205(b) of the Act was error so vital as to in effect deny to the petitioners their constitutional right to trial by jury, and this is true notwithstanding the fact that no exception was taken to the Trial Court's charge.

In support of all of the foregoing, petitioners respectfully cite the following cases:

Screws v. *United States*, 325 U. S. 91, 106-107;
Zimberg v. *United States*, 1 Cir., 142 F. 2d 132, 137-8, cert. denied 323 U. S. 712;
Kreiner v. *United States*, 2 Cir., 11 F. 2d 722, 731, cert. denied 271 U. S. 688;
United States v. *Ausmeier*, 2 Cir., 152 F. 2d 349, 356, 357;
United States v. *Levy*, 3 Cir., 153 F. 2d 995, 998;
United States v. *Noble*, 3 Cir., 155 F. 2d 315;
United States v. *Max*, 3 Cir., 156 F. 2d 13;
United States v. *Pincourt*, 3 Cir., 159 F. 2d 917;
Spevak v. *United States*, 4 Cir., 158 F. 2d 594, 598, cert. denied 67 S. Ct. 771;
Horsley v. *United States*, 5 Cir., 160 F. 2d 43, 46;
Sandroff v. *United States*, 6 Cir., 158 F. 2d 623, 630;
Christensen v. *United States*, 7 Cir., 90 F. 2d 152, 155;
Spear v. *United States*, 8 Cir., 228 Fed. 485, 488;
Fulbright v. *United States*, 8 Cir., 91 F. 2d 210, 211;

Corson v. *United States,* 9 Cir., 147 F. 2d 437;
Morris v. *United States,* 9 Cir., 156 F. 2d 525;
Miller v. *United States,* 10 Cir., 120 F. 2d 968, 972, 973;
Williams v. *United States,* 79 U. S. App. D. C. 299, 131 F. 2d 21;
People v. *Wallens,* 297 N. Y. 57, 62-63, 74 N. E. 2d 307.

The opinion of the Circuit Court of Appeals in the case at bar said, at page 175 of the Record:

> "The simple instruction that to obey the law the accused were required not to sell above the price ceilings established by the regulations certainly gave the jury a clearer conception of the crime than they could have obtained from reading, or hearing read, the complex regulations. Except for the omission of 'willfully' the definition was complete, and for reasons already stated that omission was not important."

The concluding sentence in the above quoted paragraph can find no legal sanction in any decision heretofore rendered by any tribunal.

The opinion of the Circuit Court of Appeals in the case at bar also said, at page 173 of the Record:

> "Consequently, if it appears that the jury understood that the accused were guilty only if they knew that they were selling above the ceiling price, the essential element of the crime was submitted for determination by the jury."

The Circuit Court of Appeals had no right to make the statement above quoted. The Trial Court's charge to the

jury in the case at bar, however closely scrutinized, gives no clue as to how the Circuit Court of Appeals arrived at the conclusion "that *the jury understood* that the accused were guilty only if they knew that they were selling above the ceiling price". The said conclusion could not logically follow from a fair and unbiased examination of such portions of the Trial Court's charge referred to or quoted in the said opinion.

The opinion of the Circuit Court of Appeals in the case at bar further said, at page 174 of the Record:

> "To have charged that if they did, they did it 'knowingly,' that is, 'willfully,' would have stated what every juror would have known without being told. The failure to add such statement, in the absence of any request by counsel, we cannot regard as a fatal defect."

Petitioners contend that if the Trial Court had added such a statement the result would have been fully as repugnant as the omission to mention the element of willfulness entirely. It was solely the province of the jury to decide that the acts charged were willful, and this was true however convincing and decisive the said acts might appear to be so to the Trial Court.

The opinion of the Circuit Court of Appeals in the case at bar also said, at page 174 of the Record:

> "The appellant's second point is that the pertinent provisions of the statute and of the regulations were not read or explained to the jury. There are cases holding that where this has not been done, a conviction must be reversed even though no exception was taken to the charge. [Citing in the footnote: *United States* v. *Levy*, 153 F. 2d 995 (C. C. A. 3); *United States* v. *Noble*, 155 F. 2d 315 (C. C. A. 3); *United States* v.

Pincourt, 159 F. 2d 917 (C. C. A. 3); *Morris* v. *United States,* 156 F. 2d 525 (C. C. A. 9).] These cases we discussed in *United States* v. *Center Veal & Beef Co.,* 162 F. 2d 766, 771, expressing our inability to understand why it was not sufficient for the judge to tell the jury what issues of fact determine guilt, without the necessity of telling them that the law makes criminal the commission of certain acts and they are to 'apply the law to the facts.' We still adhere to that view but again we may pass the point without decision."

The words, "again we may pass the point without decision" contained in the above quoted paragraph are contradicted by the opinion itself.

Is it not true that the Circuit Court of Appeals in its opinion said: "Except for the omission of 'willfully' the definition was complete, and for reasons already stated that omission was not important."

Is it not true that the element of willfulness was the subject matter of the Statute of the United States alleged to have been violated in the case at bar. Section 205(b) of the Emergency Price Control Act, *supra.*

Is it not true that this Statute was not read or explained to the jury and that the Circuit Court of Appeals for the Second Circuit in its opinion has attempted to justify this omission by resorting to arguments and persuasions heretofore held untenable by the Circuit Courts of Appeals in all of the other Circuits, including the Third and Ninth Circuits whose decisions are cited in the said opinion.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully,

IRVING J. ROTH,
60 East 42nd Street,
New York 17, N. Y.

Counsel for Petitioners.

March 29, 1948.

INDEX

	Page No.
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	6

CITATIONS

Cases:

Chereton v. *United States*, 161 F. 2d 808, certiorari denied, 332 U. S. 765	5
Johnson v. *United States*, 318 U. S. 189	5
Morris v. *United States*, 156 F. 2d 525	5
Wilton v. *United States*, 156 F. 2d 433	5

Statute:

Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 60 Stat. 664 (50 U.S.C. App., Supp. V, Section 901, *et seq.*):	
Sec. 2. (a)	2
Sec. 4. (a)	2
Sec. 205. (b)	2

Miscellaneous:

Federal Rules of Criminal Procedure:	
Rule 30	5
Rule 52(b)	5

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 699

CAPITOL MEATS, INC., MARK SLOTKIN, ALSO KNOWN AS MORRIS SLOTKIN, LOUIS GERBER AND MAX REINGOLD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 171-174) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered March 1, 1948 (R. 175). The petition for a writ of certiorari was filed March 27, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether, in a prosecution for making sales at over-ceiling prices, where the sole question at issue was whether petitioners demanded and received more than the ceiling price, the judge's omission to charge on wilfulness constituted prejudicial error requiring reversal of the convictions, despite the fact that petitioners' counsel specifically acquiesced in the charge.

STATUTE INVOLVED

The Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 60 Stat. 664 (50 U.S.C. App., Supp. V, Section 901, *et seq.*) provides in pertinent part:

> Sec. 2. (a) Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. * * *
>
> * * *
>
> Sec. 4. (a) It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2. * * *.
>
> Sec. 205 (b) Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4(c) [relating to the disclosure or use for personal benefit of official information by government officers] and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

STATEMENT

An information in 24 counts was returned against petitioners in the United States District Court for the Eastern District of New York charging in each count a separate sale of meat at over-ceiling prices (R. 8-21). The corporate petitioner was found guilty on fifteen counts and fined $1,000 on each of them (R. 157, 162). The individual petitioners, who are officers of the corporate petitioner (R. 121), were convicted on various counts (R. 158-159). Each was sentenced to imprisonment for 30 days on one count; sentences were suspended on the other counts, and petitioners were placed on probation for one year (R. 162-163). On appeal, the judgments were affirmed (R. 175).

Various witnesses testified for the Government that they purchased beef and liver at wholesale from the corporate petitioner acting through one of the individual petitioners; that they received invoices at ceiling prices but actually paid in cash amounts above the ceilings (R. 58-69, 76-77, 86-89, 110-112). The individual petitioners took the stand and testified that they collected only the ceiling prices (R. 123, 135-136, 137.)

In submitting the case to the jury, the trial judge told them that Congress had enacted the Emergency Price Control Act, and that pursuant to the act, rules and regulations had been promulgated which fixed ceiling prices on certain commodities, including beef and liver, the products which petitioners were charged with having sold in violation of the regulations. The judge said (R. 152-153):

> • • • Those price ceilings affected these defendants, and to obey the law they were required to keep within the price ceilings, not to sell any commodity therein referred to beyond the ceiling prices. The Government contends that in these counts that remain for your consideration these defendants did violate

> the Act by selling over the price ceilings, and that is the reason they are here on trial in this case.

The judge briefly summarized the testimony of the government witnesses that they paid amounts above the ceiling prices recorded on the invoices, and the testimony of petitioners denying that they received additional cash (R. 154-155). He then said (R. 155):

> • • • It is for you to determine which group of witnesses you believe and under the rules of evidence which I have outlined determine the guilt or innocence of these defendants.

At the conclusion of the instructions, counsel for petitioners specifically stated that he had no requests to charge and no exceptions (R. 155-156).

ARGUMENT

Petitioners' sole contention is that the judge's failure to tell the jury that, in order to convict, they must find that the violations of the price regulations were wilful, rendered the charge so incomplete in the definition of the offense that the appellate court was under a duty to reverse the convictions, despite the fact that their counsel neither offered additional instructions nor excepted to the charge.

However, as the court below held (R. 172-173), under the particular circumstances of this case the omission to charge on wilfulness was at most a formal defect which did not affect petitioners' substantial rights. The only issue in the case was whether petitioners did or did not demand and receive cash payments above the prices appearing on the invoices. Admittedly, the invoice prices were the ceiling prices (R. 125), and, admittedly, the individual petitioners personally collected bills from one or more of the witnesses who testified for the Government (R. 122, 124, 135, 137, 139). There was no claim by petitioners that they did not

know the ceiling prices, or that they inadvertently charged more than the ceiling prices. Their only claim was that they did not receive any sums above the invoice prices. When, therefore, the jury, under the judge's instructions, had to find, in order to convict, that petitioners did demand and receive cash above the invoice prices, the jury necessarily found that petitioners knowingly, i.e., wilfully, demanded and received money above the ceiling price. Under the facts of this case, therefore, the jury in following the judge's charge had to find all elements of the offense in order to convict.

Rule 30 of the Federal Rules of Criminal Procedure specifically provides that "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." While Rule 52(b) does empower an appellate court to notice "plain errors or defects affecting substantial rights," the error in this case, is, as we have shown, not one "affecting substantial rights." Having specifically approved the trial judge's instructions, which adequately put before the jury the only real issue in the case, petitioners are not now in a position to complain of that which they earlier approved. See *Johnson* v. *United States*, 318 U. S. 189, 199-201; *Chereton* v. *United States*, 161 F. 2d 808, 809 (C.C.A. 6), certiorari denied, 332 U. S. 765.[1]

---

[1] No real conflict is involved between the opinion below and the decisions cited in the opinion (R. 173), which hold that a judge's failure to explain the pertinent provisions of the governing statute constitutes prejudicial error. The judge did describe the requirements of the regulation in simple language. See pp. 3-4, *supra*. As the Circuit Court of Appeals for the Ninth Circuit held in *Wilton* v. *United States*, 156 F. 2d 433, 436, decided the day after its decision in *Morris* v. *United States*, 156 F. 2d 525, one of the cases laying down the aforementioned rule, "It is not required that a judge define the offense in the language of the statute, but only that he adequately state its essentials."

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

T. VINCENT QUINN,
Assistant Attorney General.

ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

APRIL 1948.

U. S. GOVERNMENT PRINTING OFFICE, 1948